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No. S122923

IN THE SUPREME

OF THE STATE OF CALIFORNIA

BILL LOCKYER, AS ATTORNEY	)
GENERAL,	)
	)
Petitioner ,	)
	)
vs.	)
	)
CITY AND COUNTY OF SAN	)
FRANCISCO, ET AL.,	)
	)
Respondents	)
_____	)

**AMICUS CURIAE BRIEF OF ATTORNEY ROGER JON DIAMOND**  
**REGARDING CONSTITUTIONALITY OF ARTICLE III, SECTION 3.5 OF**  
**CALIFORNIA CONSTITUTION.**

If a statute, ordinance, or regulation violates the federal constitution, state and local administrative agencies and officials must be permitted to decline to enforce such provisions notwithstanding Article III, Section 3.5 of the California Constitution.

Statewide and local administrative agencies and officials are frequently called upon to enforce statutes, ordinances, and regulations which are unconstitutional under the federal constitution. As this court well knows, there are hard cases and there are easy cases.

Sometimes the defect in a statute is obvious and a Supreme Court or a Court of Appeal will

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previously declared similar statutes to be unconstitutional. Indeed, in Schmid v. Lovette, the Court of Appeal noted that there were an “overwhelming number of school districts in California” which refused to enforce the statutes in question. Schmid v. Lovette, 154 Cal.App.3d at 474.

While the issue of gay marriage is a hot political and legal issue and may eventually come before this Court for its resolution, one can certainly imagine statutes which no reasonable public official would enforce. For example, if the State of California were to pass a statute declaring that no Moslem could have a driver’s license the Department of Motor Vehicles would properly or should properly refuse to enforce the statute. One should not have to wait for a state appellate court to make a ruling before following the United States Constitution. Other examples of invalid statutes can be imagined. Indeed, the statute in Schmid v. Lovette was an example of a ridiculous statute.

One might argue in opposition that in a democratic society it is not likely that extreme, clearly invalid measures will be adopted but only measures that arguably might be invalid, where reasonable minds could differ. Unfortunately, that is not the lesson of history.

Democracies do pass unconstitutional laws from time-to-time and, indeed, immoral laws. After World War II judges of the Third Reich were put on trial for enforcing duly adopted statutes.

There are practical reasons for not enforcing Article III, Section 3.5 of the California Constitution. The major one is the existence of Title 42, United States Code, Section 1988,

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which authorizes an award of attorney's fees to the successful plaintiff who challenges the enforcement of unconstitutional laws. That is exactly what occurred in Schmid v. Lovette, supra, where the public agency contended that it had no choice but to enforce the invalid law and therefore should not be liable for attorney's fees. The Court of Appeal disagreed and directed the trial court to award the fees. The taxpayers of the City and County of San Francisco do not want to be on the hook for millions of dollars in attorney's fees if it is ultimately determined that the public officials were correct in their assessment of the constitutionality of certain provisions of the Family Code. Again, it is not the purpose of this Amicus Brief to express an opinion, one way or the other, as to the validity of the Family Code's provision regarding heterosexual marriage. That is a matter for later resolution.

It is no answer to say that it is very easy to get appellate review quickly to determine the constitutionality of various measures. For example, writ review in the Court of Appeal or in this Court with respect to decisions by the Alcoholic Beverage Control Appeals Board or the Public Utilities Commission is discretionary. The Court of Appeal and this Court regularly summarily deny petitions brought to obtain judicial review of decisions of these agencies as well as others. Article III, Section 3.5 of the California Constitution makes the job even more difficult because when one attempts to develop an adequate record for the Court of Appeal or this Court to review which raises constitutional issues. Typically one is faced with the refusal of the administrative agency to even allow the evidence to be presented on the ground that Article III, Section 3.5 of the California Constitution would

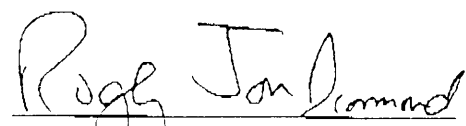
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preclude a decision on the constitutional question in any event. Therefore an inadequate record is made before the administrative agency, thereby making the task of the Court of Appeal or this Court more difficult ( and maybe impossible). Frequently one gets shut down by the administrative agency when a constitutional attack is presented because the agency claims it has no authority under Article III, Section 3.5 of the California Constitution to afford any relief and then the Court of Appeal or this Court denies relief summarily probably because the record has not been adequately developed.

For the foregoing reasons, it is respectfully requested that this Court determine that Article III, Section 3.5 of the California Constitution is invalid and violates the Supremacy Clause of the United States Constitution to the extent it precludes local officials and administrative agencies from using it to enforce laws that are unconstitutional. While it is true Article VI (2) of the United States Constitution binds "judges in every state" the word "judges" should be read broadly to include local public officials and statewide officials. At a minimum, an Administrative Law Judge should be considered to be a judge within the meaning of Article VI (2) of the United States Constitution.

Even without administrative judges, local officials should be free to follow the United States Constitution irrespective of Article III, Section 3.5 of the California Constitution.

Respectfully submitted,



ROGER JON DIAMOND  
Amicus Curiae